Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Rules and Regulations	)	CC Docket No. 02-278
Implementing the Telephone	)	
Consumer Protection Act	)	
of 1991	)	
_____	)	

REPLY COMMENTS OF ROBERT BIGGERSTAFF TO THE COMMENTS OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESSES

Robert Biggerstaff ("Commenter") hereby submits these comments in reply to the January 11, 2006 comments of the National Federation of Independent Businesses ("NFIB") in this docket on the Petition of The Fax Ban Coalition ("Petitioner") relating to the Commission's jurisdiction over interstate fax communications (DA 05-2975).

NFIB makes a wild claim "because of variations among [s]tate law there has been an explosion of lawsuits. Many of these are unfounded and require businesses to defend themselves in distant locations or settle business claims to avoid the cost of litigation." NFIB comments at 3-4. This is fiction. First of all, there is no evidence that any "explosion" of lawsuits has resulted from any "variation" among the state laws.

Secondly and more importantly, NFIB makes the absurd claim that "many" lawsuits against junk faxers are "unfounded." This bald allegation has no support of any type. While I do not doubt that NFIB and its associates don't like being sued[1] for sending illegal junk faxes, the fact they don't like it is hardly grounds for calling such actions "unfounded." The fact is the suits brought are well

1. NFIB has been successfully sued under th TCPA for various junk faxes. *See*, *e.g.*, *Opposition to Request for Stay of National Federation of Independent Business*, filed by Robert Biggerstaff in on Aug. 18, 2003 in this docket (describing NFIB litigation).

founded. For many years the junk faxers have claimed consumer actions under the TCPA and state telemarketing laws were "unfounded" but I have yet to see these industries put forth a single study showing that fact, or even a short list of cases evincing such a phenomena.[2] While at the same time, the record in this docket has ample evidence and citations to authority showing wholesale disregard of the law by telemarketers and junk faxers. My personal experience as editor and publisher of a slip reporting service for TCPA litigation[3] shows the fact is that it is the telemarketers and junk faxers, not consumers, who raise frequent arguments that are wholly without merit, wholly contra to established president, and that would be laughable were it not for the unfortunate fact that because these cases are more often than not brought by non-lawyer plaintiffs who are ill-suited to rebut such chicanery. For example, from my prior comments on this docket:

> For example, in what can only be described as a Kafkaesque interpretation in a TCPA case in Virginia, although the Commission's rules under the TCPA require a company to keep a list of people who have asked not to receive further telemarketing calls (47 C.F.R. 64.1200(e)) AT&T **successfully argued** the law does not require AT&T to actually refrain from calling those people on the list. Stephen Dinan and Margie Hyslop, *States Trying to Restrict Telemarketers*, THE WASH. TIMES, Feb. 3, 2000 at C3. Another telemarketer argued that the average consumer's message on their home answering machine instructing callers to "leave a message" was "express invitation" for the caller to make pre-recorded telemarketing calls. *Agostinelli v. LM Communications, Inc.*, defendant's memo. of law, No. 00-SC-86-2862 (Magis. Ct. S.C. August 17, 2000). In a case where I was the plaintiff, a telemarketing firm claimed that a prerecorded call that asked "if 6 days and 5 nights in Florida for only $97 sounds good to you, press '1' now to hear all the details" was actually a "survey" exempted from the TCPA and by pressing '1,' I had consented to receive the solicitation. A chiropractor making prerecorded calls in my state to attract new clients, argued that calls offering chiropractic service were exempted from the TCPA as they were made for "emergency purposes" because people's health is always an emergency. Because the fora for consumer actions under the TCPA are

2. The industry was quite able, however, to demonstrate excellent research skills in preparing in exceptional detail, the state fax laws and their alleged "inconsistencies" with the TCPA and Commission rules. It would seem that if the evidence exists to support their claims, the industry has demonstrated the ability to tabulate it.

3. <http://www.TCPALaw.com>.

> almost exclusively state small claims courts, these arguments often prevail when presented before non-attorney magistrates and against non-attorney pro se plaintiffs. In my opinion, some unscrupulous defense attorneys have make improper representations to small claims courts - for example presenting a single cherry-picked single case from another venue supporting the defendant's argument, while failing to advise the court of a dozen opinions otherwise. Defense attorneys have even cited reversed case law claiming it was still authority, and claimed a lower court opinion was that of a state supreme court.[4]

The Commission should view the unsubstantiated and conclusory claims by NFIB of "explosion" of lawsuits caused by state laws, with great skepticism.

I do agree with one statement of NFIB: "Businesses use a variety of faxes to communicate with their customers: Purchase orders, copies of orders, order confirmation, invoices, copies of invoices, drawings and artwork proofs, sales tax exemptions, among others." Notably, none of these items are advertisements, but all are interfered with by the billions of junk faxes consuming paper and other supplies, and tying up the fax lines. Only a business that *chooses* to send fax advertisements into California to *solicit* Californians will be affected by the California law.[5]

The mantra repeated in nearly every industry filing in this docket, is that restrictions on faxing prevent recipients from receiving "valuable" information. This, of course, depends on perspective. The telemarketing industry said the same thing about unsolicited telemarketing calls, yet people universally hate telemarketers, and the signups to the national DNC list are over 100 million households.

The fact is that while the advertiser thinks his missives are wanted and desired (they always do), the vast majority of their victims do not want those missives. The small minority who may want the junk faxes can not be justification for forcing the majority to submit. As was mentioned in the

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4. Comments of Robert Biggerstaff, CG Docket No. 02-278, Dec 5, 2002 at 2-3.

5. A business already in California would be subject to the California law regardless of the Commission's actions.

context of telemarketing, to do so would be like forcing all the patrons at a bar to endure being groped, just because one person at the bar found it desirable.

NFIB and similar organizations appear to be serving their own organizational self interests (to junk fax their own members with offers irrelevant to their membership as NFIB was found guilty of doing in Missouri) rather than truly serving the silent majority of their members who don't send, and don't want, junk faxes.

Respectfully submitted, this the 2nd day if February 2006.

/s/
Robert Biggerstaff